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October 2, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: CS Docket No. 96-60
Ex Parte Presentation

Dear Mr. Caton:

On behalf of ValueVision International, Inc. ("ValueVision"), and pursuant to Section 1.1206 of the Commission's rules, this letter is being filed in duplicate to notify the Commission of the attached written communication in connection with the issues raised in ValueVision's comments and reply comments filed in the above-referenced proceeding.

If there are any questions concerning the above-referenced matter, please communicate with the undersigned.

Sincerely yours,

William R. Richardson, Jr.

cc (by hand): Meredith Jones
William Johnson
Rick Chessen
Lynn Crakes
Ed Gallick

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October 1, 1996

BY HAND

Ms. Lynn Crakes
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: CS Docket No. 96-60

Dear Ms. Crakes:

Per our discussion last week, and on behalf of ValueVision International, Inc. ("ValueVision"), this letter addresses the question whether the Commission's proposed opportunity cost formula should include some recognition of the potential loss of subscriber revenue to the cable operator that may result from substituting leased access programmers for incumbent cable programmers. ValueVision hopes the information supplied herein will be helpful to the Commission in its efforts to address this question.

At the outset, ValueVision notes that the Commission has "tentatively conclude[d] that, in the tier context, any such subscriber loss is too speculative to measure accurately." Notice ¶ 86. The cable industry is in the best position to provide information about the elasticity of demand by its customers, as well as its plans for increased channel capacity. Its failure to provide any such information -- as in the case of its opposition to must carry -- speaks volumes. So does the recent decision by TCI to drop Lifetime and other established cable programmers in favor of a new Fox news channel, notwithstanding prior surveys that its subscribers did not prefer a second news channel.[1/] Apart from highly misleading surveys that reply commenters have uniformly discredited, the only real evidence on this point from cable operators is the testimony of Continental's Senior Vice President of Programming and Advertising that the Commission's tentative conclusion is correct. In his view, it is "impossible to separate the impact on a cable system of particular programming decisions from other important factors, such as price, advertising and promotional efforts, and changing consumer tastes." See ValueVision Reply Comments at 17 & n. 55.

In these circumstances, in order to discharge its statutory mandate to make leased access a genuine outlet for unaffiliated cable programmers, the Commission must make "predictive and normative judgments" about the effects of its policies. Syracuse Peace Council v. FCC, 867 F.2d 654, 660 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). And for resolution of legislative as opposed to adjudicative facts, as Judge Leventhal observed, "a month of experience will be worth a year of hearings." Id., quoting American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir.)(en banc), cert. denied, 385 U.S. 843 (1966).

As the Commission has recognized, predictive judgments of this kind can be based upon the use of interim "proxies" derived from the record. The Commission has twice recently relied on such proxies to meet similar statutory deadlines in the 1996 Act: for interconnection charges, and for per call compensation arrangements for pay phone providers.[2/] In this case, the undisputed record evidence supplied by ValueVision indicates that QVC and HSN both have historically secured channel carriage from unaffiliated as well as affiliated cable operators based upon a 5% net revenue payment that averages somewhere between 7 and 12 cents per subscriber per month. See Comments of ValueVision at 3 n.5. This rate is not necessarily the lowest rate deemed acceptable for a channel by cable operators, and it is a supracompetitive price negotiated by operators with market power. Nevertheless, it could serve as an interim proxy for some period (e.g. two years) during which the Commission could gather data about the subscriber losses, if any, generated by making leased access the genuine outlet Congress intended. Such a formula would establish only a floor. Cable operators could demonstrate that the opportunity cost formula entitled them to higher rates; alternatively, if their predictions are accurate and there is a flood of applicants for leased access, they would be free to set the proxy rate as a bidding minimum for the market rate during this interim period.

1/ See CableWorld, June 3, 1996 (Fox transaction "would mark an about-face for TCI, which released research a few months ago casting doubt on the public's appetite for more all-news services"); Multichannel News, July 1, 1996, at 1 (January TCI survey indicated 79% of its customers preferred that new news services be sold a la carte).

2/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, at ¶¶ 767 et seq. (released Aug. 8, 1996); Implementation of the Pay Telephone Reclassification and Competition Provisions of the Telecommunications Act of 1996, FCC 96-388 (released Sept. 20, 1996), at ¶¶ 119 et seq.

Alternatively, the Commission could establish an interim opportunity cost formula including its best predictive judgment of the potential subscriber loss (if any) arising from leased access and revisit that formula after some period of experience with it. That judgment could similarly be based upon existing experience with leased access programmers. ValueVision, for example, has replaced other programmers in only three major switchouts for which any data is available, each involving a different MSO.[3] In each of these cases, ValueVision asked the cable operator to monitor any negative subscriber reactions to the change. In each case, there were virtually no disconnects attributed by the cable operator to the changes, and plainly insignificant numbers of complaints:

1. System A; Midwest; major MSO owned. This was a 1996 switch involving approximately 190,000 subscribers. The operator sent ValueVision a list of only 358 complaints (0.19%), and advised that there were no disconnects attributable to the switch.

2. System B; Midwest; non-major MSO owned. This was a 1995 switch involving a system serving approximately 150,000 subscribers. The operator gave ValueVision a list of only 102 subscribers complaining of the switch (0.07%), later advised that complaints subsided within two weeks for all but 8 to 10, and reported only one disconnect that could arguably be attributed to the change.

3. System C; Southeast; major MSO owned. This was a 1995 switch involving about 210,000 subscribers. While the system initially complained of 600 phone calls, it ultimately forwarded ValueVision a list of only 40 subscribers (0.02%). Upon ValueVision's visit less than two weeks later, customer service representatives advised that calls had largely abated. (ValueVision has no real data in this case about the extent of any subscriber losses attributable to the change.)

These experiences, of course, are anecdotal; given the difficulties of access for leased access programmers, there are simply very few such examples available. But these cases provide real world experience that strongly supports the Commission's tentative conclusion that cable operators can replace relatively unpopular channels in complying with their statutory leased access obligations in a way that minimizes subscriber loss -- even ignoring the very real possibility that new programmers like ValueVision may actually add value to subscribers. This is, of course, precisely what has happened in the case of must carry, despite similar claims of lost subscribership (and requests for stay that have been denied) from addition of allegedly unpopular broadcast stations. As the Bureau found only recently in one of these must carry cases, "cable operators add and delete cable programming services from time to time, and at their own discretion, without

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[3] While each of these three involved switchouts of HSN or QVC, the identity of the programmer being dropped should be irrelevant for these purposes. As programmers themselves concede in their comments, the channels likely to be dropped are inevitably going to be the ones selected by the cable operator (on ratings or other data) as those without "strong subscriber viewership." Comments of Prevue and Liberty Sports.

imposing an undue burden on subscribers' viewing habits." Cablevision Systems Corp., DA 96-1231 (August 2, 1996), at 7.[4]

Based on these experiences, which indicate that subscriber loss appears to be virtually nonexistent, ValueVision believes that interim proxies for subscriber loss of 1% of tier revenue for the first three unaffiliated leased access programmers added, 2% for the next three, and 3% for the next three, shared among these providers, would be more than adequate. To address concerns about additional subscriber loss in those larger systems required to make 10 or more channels available for leased access (of which ValueVision believes there are currently very few), the Commission could permit subscriber loss showings even during the interim period, or perhaps exempt such systems from the formula altogether during that period. Similarly, the Commission could exempt or provide waivers for small cable systems (as defined in the rules not to include affiliates of major MSOs), to ensure that systems depending upon relatively few subscribers are not unduly affected if the interim formula proves to be substantially inconsistent with later experience.

Either of these alternatives would be a reasonable effort by the Commission to discharge its statutory mandate while providing a basis for testing the potential for subscriber losses that the cable industry has consistently alleged but never proven -- just as with must carry. What the Commission cannot and should not do, as the Chairman has advised in similar circumstances, is to abandon needed reform of leased access by failing to recognize the need to "go ahead with the best we can and recognize that the perfect is enemy of the good." Telecommunications Reports, July 15, 1996, at 1. The Commission cannot decline to adopt a solution to a clear problem identified by Congress in 1992 simply because it cannot predict the future with total certainty -- any more than it could have done so in implementing the 1996 Act. ValueVision hopes that these proposals for interim proxies can serve as a way of advancing that solution.

Respectfully submitted,

William R. Richardson, Jr.

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[4] Similarly, as the industry has recognized, losses suffered by dropped programmers "will most likely be temporary, and operators will add those channels back as full-time or part-time services when they expand channel capacity again." "Request Loses Subs to Fox News," Multichannel News, Sept. 16, 1996, at 30. As the President of CATA now notes, "What you will see in the next two years is a significant increase in channel capacity in the major markets." "Some say TCI flap much ado about nothing," Electronic Media, Sept. 16, 1996, at 31.